STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Owens, P.J., Markey and Murray, J.J.

PRESERVE THE DUNES, INC.,
Plaintiff-Appellee

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

TECHNISAND, INC.
Defendant-Appellant

/

Supreme Court No. 122611

Court of Appeals No. 231728

Berrien CC No. 98-003789-CE

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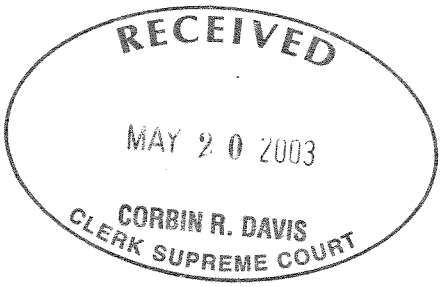
DEFENDANT-APPELLANT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF

ORAL ARGUMENT REQUESTED



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Dated: May 20, 2003

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QUESTIONS PRESENTED FOR REVIEW

I. **The Legislature has limited the authority of the Department of Environmental Quality (DEQ) to issue a sand mining permit by historical considerations, notwithstanding the Department's authority to issue the permit if it finds that the mining satisfies the standards of the Michigan Environmental Protection Act (MEPA). Where it is shown that the permitted mining will not result in pollution, impairment or destruction of the environment, can a court that has jurisdiction only under MEPA invalidate the permit upon a showing that the applicant was not eligible to receive it due to the historical factors, without regard for the proof supporting the affirmative defenses authorized by MEPA?**

II. **Does the Michigan Environmental Protection Act authorize a court to grant summary disposition when a party shows a prima facie violation of a valid, applicable and reasonable statutory procedure, without regard for evidence that the proposed action will not result in pollution, impairment or destruction of the environment, without regard for the affirmative defenses authorized by MEPA, and without weighing admissible evidence presented to the trier of fact?**

STATEMENT OF PROCEEDINGS AND FACTS

On October 12, 1979, the Department of Natural Resources (DNR) issued Martin-Marietta Aggregates a permit to mine sand at its 26.5 acre Nadeau site in Hagar Township, Berrien County. (Appendix p 57a). Manley Brothers of Indiana, Inc, owned the adjacent property and obtained the Nadeau project area in 1984, so that, according to agency practice, all of its contiguous ownership was controlled by the permit. (Appendix p 36a ¶ 8).

Defendant TechniSand obtained the Nadeau site and the existing permit from Manley Brothers on July 28, 1992.. (Appendix p 61a). After a two-year permitting process, the Department of Environmental Quality (DEQ) issued TechniSand an amended permit on November 25, 1996. (Appendix p 63a). That permit expanded the mining area and authorized TechniSand to mine into a portion of a critical dune area that extends from the west at the shore of Lake Michigan and to the south and north along the lake west of I-96 across that highway into the Nadeau site. (Appendix pp 65a; 67a).

Preserve the Dunes (PTD) filed suit on July 2, 1998, alleging that the DEQ had issued TechniSand an amended permit authorizing TechniSand to mine sand at its "Nadeau site" in Hagar Township, Berrien County without authority (Complaint, ¶ 12), because TechniSand could not meet the requirements of § 63702 of Part 637, Sand Dune Mining (SDMA), MCL 324.63701 *et seq*, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*, that concern the status of an operator as a part owner or operator (Complaint, ¶ 17). The complaint also referred to Part 17, the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq*, of NREPA. It requested declaratory relief and an injunction requiring the DEQ to rescind the amended permit and TechniSand to avoid mining in the designated critical dune area.

PTD then amended its complaint to allege that the issuance of the permit was likely to result in pollution, impairment or destruction of the resources of the affected critical dune area. (First Amended Complaint, ¶¶ 18, 19).

Defendants sought summary disposition of the alleged SDMA violations as untimely administrative appeals. (See, e.g. DEQ's Amended Motion for Summary Disposition, ¶¶ 4 & 5). These motions were denied. As Judge David M. Peterson construed the amended complaint, it did not question whether the permit had been properly granted, but it did state an independent MEPA action based upon alleged environmental damage, an action that is not time-barred. (Appendix pp 23a-24a).

The DEQ's Answer to the Amended Complaint not only denied that the permitted mining would result in environmental impairment, but it also affirmatively asserted that there was no feasible and prudent alternative to the authorization of the proposed the mining that was consistent with the protection of public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution impairment, or destruction. (Appendix pp 28a-32a).

At the end of discovery, PTD brought a motion for summary disposition under MCR 2.116(C)(10), claiming that TechniSand was ineligible to receive an amended mining permit under SDMA, because it was not the operator prior to 1989, and that that fact alone established a MEPA violation. In reply, the DEQ argued that TechniSand was eligible to receive a permit under MCL 324.63702, and it submitted the Affidavit of Roger Whitener (Appendix pp 33a-38a), the supervisor of the sand dune mining permit program for the Department. (Appendix p 34a). He described TechniSand as eligible for the permit as the purchaser of a preexisting permit covering the entire site. (Appendix pp 35a- 37a). He then compared the site's environmental values to those of other critical dune areas. (Appendix pp 34a-35a; 37a-38a). He identified the

provisions of the Progressive Cell Unit Mining and Reclamation Plan (PCUMRP) that protect the environmental values on the site (Appendix pp 36a-37a), and, in support of the department's affirmative defense, explained how the sand on the site is essential to the foundry industry in Michigan. (Appendix pp 37a-38a).

Judge Scott Schofeld ruled, as had Judge Peterson before him, that the challenge to the permit could proceed to trial under MEPA. (Appendix p 50a). But he also found PTD's claims concerning the TechniSand's permit eligibility under § 63702 untimely. He granted Defendants partial summary disposition, disposing of that administrative claim. (Appendix pp 47a-48a). Only the claim that the mining would adversely impact the environment was preserved for trial.

Testimony during trial established that this is the only critical dune area in Michigan with elevated dunes east of I-96 and the last acreage within any critical dune area where mining can still be authorized by the DEQ. (Appendix p 217a). The site is separated from the remainder of the critical dune area by two highways and by other human activities. (Appendix p 122a). There are two separate ecological subsystems in this region: a shoreline dune subsystem and an inland dune subsystem. (Appendix p 55a). The ecological subsystem in which the mining will occur will not be affected by the mining. (Appendix p 208a). The mined area will have the same ecosystem after the mining, and it will still be partially located in a critical dune area. (Appendix p 139a). The shore subsystem, with its greater diversity, steeper topographic relief, and greater numbers of plant systems and fauna, will also be unaffected by the mining activity. (Appendix pp 170a-171a; 190a). The permit conditions included a conservation easement to protect aesthetic values of the site, the water table and a wetland to the north. (Appendix p 39a). A still-required permit would protect threatened plant species and special concern plants, according to Dr. Glen Goff, the Department's ecologist, who also testified that the inland dune subsystem might actually provide more suitable habit for species of concern to Dr. Barbara Madsen, PTD's

witness, after mining than now (Appendix p 195a). Preservation of the dune feature of this critical dune area is not ecologically critical. (Appendix 208a).

Mr. Peter Collins, the ecologist who had prepared TechniSand's Environmental Impact Statement, and Dr. Goff testified to the lack of significant flora and fauna at the site. (Appendix p 201a). PTD's witnesses expressed concern the mining would affect the water table, but Mr. Collins showed that the water table would be ecologically unaffected. (Appendix p 99a). The data in the EIS filed years earlier demonstrated that the water table under the dune was 5 to 10 feet lower than PTD's witness predicted. (Appendix pp 80a-83a). Defense witnesses showed that the diminution of the dune mass by removal of sand, the natural resource of which it is composed, does not significantly affect the ecological functions on the site. (Appendix pp 138a; 200a).

According to Dr. Goff, the ecological conditions that exist on the site result from the proximity of Lake Michigan, not from the presence of the dune formation. (Appendix p 206a). Indeed, the evidence showed that plants of concern to PTD do not occur in the critical dune area but elsewhere on the site, and occur there because of earlier human disturbance. (Appendix p 119a).

The court issued its Opinion and Judgment on November 30, 2000. In a model decision based upon the directives of *Nemeth v Abonmarche Development Company, Inc*, 457 Mich 16, 36; 576 NW2d 641 (1998), Judge Paul L. Maloney reviewed the evidence and determined that, although PTD had submitted proofs sufficient to withstand a directed verdict (Appendix p 218a), the Defendants had successfully rebutted PTD's prima facie case. (Appendix p 237a). He held that PTD had no cause of action under MEPA. (Appendix 238a). He did not reach the affirmative defenses.

Upon review of the evidence, the trial court concluded that the proposed mining would not destroy or impair the critical dune areas of the state, the resource defined by the Legislature in Part 353, MCL 324.35302(a). (Appendix p 235a). The trial court determined that, as a result of the regulatory process and accommodations made by TechniSand during the permitting process, mining according to the permit would protect the site's identifiable environmental features. (Appendix 235a- 237a). The court found "minimal adverse impacts," and it determined that these do not rise to the level of impairment or destruction of natural resources within the meaning of MEPA. (Appendix p 237a).

The trial court reported that it undertook the independent, *de novo* review required by *West Michigan Environmental Action Council (WMEAC) v Natural Resources Commission*, 405 Mich 741, 752; 275 NW2d 538 (1979), and *Nemeth*, 457 Mich at 34, and gave no deference to the administrative decision or to the expertise of the DEQ. (Appendix p 218a).

The Court of Appeals reversed the determination of no cause of action upon finding that the DEQ was not authorized to issue the amended permit pursuant to § 63702 of SDMA. MCL 324.63702. (Appendix p 252a). The Court of Appeals determined that § 63702 provided the applicable legal standard by which to evaluate PTD's MEPA claim. (Appendix p 243a). According to the Court of Appeals, the statutory requirement that an applicant have a certain status was the standard to be used as a basis for determining a violation of MEPA, making it unnecessary to determine whether the action is likely to pollution, impair or destroy the resource. (Appendix p 249a). After adopting the "standard" contained in § 63702, the Court of Appeals determined that TechniSand did not qualify for a permit under either of the exceptions under MCL 324.63702 because TechniSand purchased the subject site too late, and its purchase of the right to mine the site did not carry a right to seek amendment to expand the mining into all areas "covered" by the permit. (Appendix p 260a-261). Because the DEQ was therefore not authorized

to amend the permit to allow TechniSand to mine in critical dune areas, the Court of Appeals ruled that it violated MEPA when it granted the permit to TechniSand, without consideration of the fact that the mining would not have adverse environmental consequences. (Appendix p 264a).

ARGUMENT

I. Section 63702 of Part 637, of the Sand Mining Dune Act (SDMA), (MCL 324.63702) was neither intended to be, nor does it provide, a Michigan Environmental Protection Act (MEPA) standard. The question of whether the Department of Environmental Quality (DEQ) erroneously determined TechniSand's eligibility for a permit under § 63702 does not raise a MEPA question, but a question of administrative law.

A. Standard of Review

The Court of Appeals based summary disposition upon its interpretation of the relationship between Part 637, SDMA, and Part 17, MEPA, of NREPA. Statutory construction is reviewed *de novo*. *In re MCI Communications*, 460 Mich 396, 413; 596 NW2d 164 (1999). The objective of the inquiry is to give effect to the legislative intent. *Aikens v State Dep't of Conservation*, 387 Mich 495, 499; 198 NW2d 403 (1992). The intent may reasonably be inferred from the words expressed in the statute. *State Farm Fire & Casualty Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Where the language of the statute is clear and unambiguous, it must be enforced as written, and no further construction is necessary or permitted. *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001).

B. Nemeth v Abonmarche Development, Inc directed the courts to re-initiate the development of the common law of environmental quality required by MEPA.

State Highway Comm v Vanderkloot, 392 Mich 159, 182-183; 220 NW2d 416 (1974), identified the provisions that now make up Part 17, of NREPA ("MEPA") as the "chief legislative enactment currently fulfilling" the Legislature's mandatory duty, under Const 1963, art 4, § 52, to protect our natural resources.[1] As NREPA shows, the Legislature has since enacted numerous additional statutes providing environmental protection. MEPA itself describes

[1] Sec. 52. The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

how other provisions of NREPA dealing with pollution standards must be considered in relation to the general provisions of MEPA.

MEPA remains the central provision of the environmental protection required by the Constitution. Under § 1701 of MEPA, MCL 324.1701, a court can determine whether any proposed action protects natural resources from pollution, impairment or destruction and review any standard for pollution or for an antipollution device or procedure fixed by state or local law to determine whether that standard is adequate. If it is not, the section directs adoption of an appropriate standard.

> Sec. 1701. (1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.
>
> (2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:
>
> (a) Determine the validity, applicability, and reasonableness of the standard.
>
> (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court. [MCL 324.1701.]

Reiterating that the basic "import" of *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975), remains that it is a necessity for the trial court to prepare findings of fact based on the rules of evidence concerning how the plaintiff establishes a prima facie case, the Court has held that § 1701(2) is "a vital part of our court's development of the 'common law of environmental quality." *Nemeth v Abonmarche Development Company, Inc.*, 457 Mich 16; 29-30; 576 NW2d 641 (1998). Section 1701(2) reflects the Legislature's expectation that the Legislature and state and local agencies will participate in the development of environmental law, subject to review by the courts "to determine whether such legislative and administrative

enactments are the appropriate 'pollution control' standards to be applied to a claim under the MEPA.[2] *Nemeth*, 457 Mich at 30. Violation of such a statutory standard can establish a prima facie MEPA violation. *Nemeth*, 457 Mich at 36.

In *Nemeth*, this Court reviewed a decision based upon Part 91, MCL 324.9101, *et seq*, "Soil Erosion and Sedimentation Control" (SESCA), of NREPA. There the trial court had determined that SESCA provided the "appropriate pollution control standard," within the meaning of § 1701, *Nemeth*, 457 Mich at 30, and that the defendants had not rebutted plaintiff's prima facie case. *Nemeth*, 457 Mich at 37. Reversing the Court of Appeals, which had rejected the injunction imposed by the trial court based upon its finding of a violation of MEPA, this Court said:

> Contrary to the Court of Appeals holding in this case based on *Dafter* [*Sanitary Landfill v Superior Sanitation Service*, 198 Mich App 499, 499 NW2d 383 (1998)], n 9 *supra*, a prima facie case under the MEPA can be established by proving violations of the SESCA. Where the purpose of the statute used as a pollution control standard is to protect our natural resources or to prevent pollution and environmental degradation, a violation of such a statute can establish a prima facie case under the MEPA. The major purposes of the SESCA are to protect water and soil through the prevention and control of erosion and sedimentation. Thus, a violation of the SESCA can establish a prima facie case under the MEPA, provided that the trial judge has deemed the SESCA standards appropriate, applicable and reasonable. [*Nemeth*, 457 Mich at 36.]

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[2] To say that in § 1701 the Legislature specified how standards for pollution and for antipollution devices and procedures are to be handled in the course of a MEPA action is not to say that forms of impairment and destruction of the environment other than pollution go unregulated. They are prohibited by MEPA. The relationship of MEPA to environmental standards that do not relate directly to pollution matters was not directly addressed by the Legislature in § 1701. That relationship is undoubtedly more complex than that involving standards relating to pollution, which it may have perceived, generally involve numerical standards. The relationship between non-pollution standards that provide environmental protection and the provisions of MEPA will undoubtedly be worked out over time by the courts when developing environmental common law. For example, in *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 760; 275 NW2d 538 (1979), evidence called for protection of an elk herd to prevent impairment or destruction of a unique resource. Pollution was not an issue. In every MEPA case, the issue will be the actual or likely effect of the proposed action on the natural resources. *Nemeth*, 457 Mich at 35.

The trial court had evaluated the plaintiff's claim and the proposed standard at trial. Here the Court of Appeals proposed to bridge the gap left by the trial court's determination that § 63702 of NREPA is an administrative standard but not a MEPA standard (Order of July 30, 1999, p. 4) by finding a MEPA violation as a matter of law.

The provisions applied in the present case will not allow adoption of all of Part 637 as a MEPA standard. By 1994 P.A. 215, sec 9, MCL 324.63709, the Legislature specified that MEPA applies to the department's permitting activity. However, when the legislature adopted § 63702, it specifically distinguishes its eligibility requirements based upon past ownership of land or permit from the requirements imposed by MEPA.

C. **By its terms, § 63702 of SDMA regulates eligibility to mine in critical dune areas based on status as a past owner or operator, and does not specify what environmental considerations govern the DEQ when processing a permit application to determine whether the proposed activity complies with Part 17, MEPA.**

Part 637 of NREPA, "Sand Dune Mining," regulates mining and reclamation through a permit system administered by the DEQ. It prescribes a specified environmental impact statement, MCL 324.63705, that reviews mining proposed according to a required progressive cell-unit mining and reclamation plan, MCL 324.63706, and a 15-year mining plan, MCL 324.63707, and it limits mining except according to a permit issued by the Department according to MCL 324.63708. Until 1994, the Department was to be guided by whether the "proposed sand mining operation would have an irreparable harmful effect on the environment." 1976 PA 222, § 9. The Department's authority to issue the permit has, since 1994 PA 215, been governed by the standard set forth in Part 17 of NREPA, MEPA, MCL 324.63709:

> Sec. 63709. The department shall deny a sand dune mining permit if, upon review of the environmental impact statement, it determines that the proposed sand dune mining activity is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, as provided by part 17.

The language of § 63709 became effective June 23, 1994, 1994 PA 215, shortly before the creation of the DEQ, the order creating which was effective October 1, 1996. MCL 324.99903. It is distinctive in that it makes the agency's permitting standard the same as the standard required to establish a MEPA violation under Part 17. That is, whether the mining is likely to pollute, impair or destroy natural resources. It directs the agency to apply that standard to information provided in a required Environmental Impact Statement. It can be reasonably inferred that the Legislature intended the review authorized by § 63709 of SDMA to be the same as the review required by Part 17, but limited to the information in the EIS.[3]

Since the Legislature has declared the standard applied by § 63709 of SDMA to be identical with the provisions of MEPA, it no longer makes sense to look elsewhere in the SDMA for MEPA "pollution control" standards, as the Court of Appeals did in this case, particularly not to § 63702, which applies, "notwithstanding" what may be authorized by the provisions of part 17, MEPA.

Section 63702, limits mining according to the operator's historical ownership and when the permit was first issued.

> Sec. 63702. (1) Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 after July 5, 1989, except under either of the following circumstances:
>
> (a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.

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[3] A court could rule that the permit procedure set forth by § 63709 and the provisions to which it applies constitute the applicable MEPA standard and establishes a MEPA violation, or not, depending upon the agency decision, subject to administrative review. If that were the case, there would be no need for separate court review to determine environmental impacts.

(b) The operator holds a sand dune mining permit issued pursuant to § 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit.

(2) As used in this section, "adjacent" means land that is contiguous with the land for which the operator holds a sand dune mining permit issued pursuant to § 63704, provided no land or space, including a highway or road right-of-way, exists between the property on which sand dune mining is authorized and the adjacent land. [MCL 324.63702.]

The Court of Appeals in this case based its decision solely on its view that § 63702 of SDMA prevented TechniSand from mining the portion of a critical dune area at the Nadeau site. It did not base its decision on any factual showing that the authorized mining has potential adverse environmental consequences. Such a showing by a preponderance of the evidence is required to make out a MEPA claim. *Nemeth*, 457 Mich at 35-36. Indeed, the Court of Appeals did not even address the trial court determination that there would not be any such consequences. (Appendix p 237a). Rather, the permit was invalidated under MEPA on the basis that the § 63702 limitations on permit eligibility provide a "standard or procedure" that must be applied as a MEPA standard, the violation of which establishes a per se MEPA violation according to the Court of Appeals:

> We believe that the standard to be used as a basis for determining a violation of MEPA under the present circumstances involving critical dune area mining is found within the SDMA. We conclude that when a party seeks to mine in a critical dune area, it must first fall within one of the exceptions set forth in MCL 324.63702. It is only after MCL 324.63702 is satisfied that the party seeking to mine in a critical dune area must also satisfy the general requirements of MCL 324.63704 and MCL 324.63709. If MCL 324.63702 is not satisfied, then mining in a critical dune area is prohibited, and further analysis of MCL 324.63704 and MCL 324.63709 is unnecessary. In contrast, when a party seeks to mine in a non-critical dune area, it must comply only with the general requirements of MCL 324.63704 and with the umbrella standards for impairment or destruction under MCL 324.63709. [Appendix p 245a.]

The question raised by the Court of Appeals' opinion is whether every provision of NREPA that could be construed to limit a permit applicant's eligibility to engage in development activities is a MEPA standard such that violation of that standard establishes a MEPA violation. In this case such an interpretation reaches a result that is directly contradicted by the evidence submitted by affidavit and then at trial that the activity will not impair any natural resources, and avoids the showing authorized by § 1703 of MEPA as an affirmative defense. Review of the language of Part 637 reveals that the Legislature has indicated that it did not intend to establish a MEPA violation without a finding of environmental degradation. Section 63702, which concerns an applicant's ownership history and the history of the permit, operates to establish permitting criteria independent of the requirements of MEPA.

The term that introduces the provisions of § 63702, the term, "notwithstanding," cannot be regarded as mere surplusage. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 364; 459 NW2d 279 (1990). It is necessary to give meaning to every part of § 63702 and to avoid rendering any part nugatory. *State Bar of Michigan v Galloway*, 422 Mich 188, 196; 396 NW2d 839 (1985). The rule was recently stated in *State Farm*, 466 Mich at 146, as follows:

> Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplus age or nugatory. *Wilkens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2000). Further, we give undefined statutory terms their plan and ordinary meanings.

Here the term "notwithstanding" at the introduction of § 63702 indicates that the requirements of § 63702 are to control the department's permitting decisions, even when it is determined, as here, that MEPA, as a distinct provision, can be satisfied.[4]

[4] *Kootz v Ameritech Services, Inc*, 466 Mich 304, 313-315; 645 NW2d 34 (2002), deals with how two statutory sections, both of which begin with the term "notwithstanding" could be interpreted together, and finds the solution in the language of the provisions.

Ordinary use provides the meaning of undefined terms used by the legislature. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-249; 596 NW2d 574 (1999). Ordinary meaning indicates that the term "notwithstanding" means "in spite of," and refers to opposition to contrary circumstances. The American Heritage Dictionary of the English Language, New College Edition, 1975.

Section 63702 specifically applies "notwithstanding" to "any other provision of this Part." The only other limitation upon the department's authority to issue a permit appears at § 63709 of SDMA. Only an applicant who can satisfy the requirements of § 63709, that is, the restrictions imposed by Part 17, suffers any additional limitations by the application of § 63702. Since § 63709 limits the department's authority to issue a permit according to Part 17, and § 63702 applies "notwithstanding any other provision of this part," § 63702 is separate from § 63709 and from Part 17, which § 63709 incorporates. It functions to limit mining even when § 63709 can be satisfied, and it operates separately from Part 17.

This interpretation of the effects of the term "notwithstanding" is consistent with its effect in other contexts. The use of the phrase "Notwithstanding any other provision of law . . . " at the beginning of MCL 500.3135(1) of the No-fault Act, MCL 500.3101 *et seq*, which eliminates tort liability without a showing of death or serious impairment of a bodily function, resolves an apparent conflict with a provision of the governmental immunity statute, MCL 691.1404, which imposes liability for damages arising out of negligent operation of a motor vehicle. "On its face, therefore, this measure reflects the Legislature's determination that the restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute." *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000). Similarly, here the occurrence of the phrase, "Notwithstanding any other provision of this part," in § 63702 indicates that even if mining is not restricted by MEPA under § 63709, § 63702 may still control the department's

issuance of a permit; the department cannot issue a permit unless the applicant meets its additional restrictions.

The Court of Appeals ignores this legislative ordering between the two sections and interprets § 63702 as simply a preliminary MEPA inquiry.

> It is only after MCL 324.63702 is satisfied that the party seeking to mine in a critical dune area must also satisfy the general requirements of MCL 324.63704 and MCL 324.63709. If MCL 324.63702 is not satisfied, then mining in a critical dune area is prohibited, and further analysis of MCL 324.63704 and MCL 324.63709 is unnecessary. [Appendix p 245a.]

But, the Legislature has provided that § 63702 is to be applied "notwithstanding" other provisions of Part 637, thereby indicating that the considerations, "as provided by Part 17," required by § 63709 are separate from and subordinate to the considerations of § 63702. Those other considerations are the considerations imposed by Part 17, MEPA.

D. The Court of Appeals identifies § 63702 with MEPA not only by ignoring the language of that section, but also by redrafting MEPA and transforming existing precedent.

To the Court of Appeals, § 1701 of MEPA is an entirely different provision than the statute adopted by the Legislature and examined in *Nemeth*. MEPA proposes to protect natural resources from pollution, impairment and destruction, and, with respect to pollution, provides for special consideration of certain existing standards. But the Court of Appeals rewrites § 1701 while setting forth the portion of this Court's *Nemeth* decision that the Court of Appeals calls its most significant clarification of the MEPA standard (Appendix p 247a). The Court of Appeals then amends the language of § 1701(2) by adding an indefinite article, thereby multiplying the matters that are incorporated into MEPA.

When discussing this Court's description of a MEPA action, the Court of Appeals propounds the following paraphrase of *Nemeth*, 457 Mich at 35:

> [E]ach alleged MEPA violation must be evaluated by the trial court using the pollution control standard [this may be a standard for pollution control, a standard for a pollution control device, or a standard for a certain procedure, MCL 324.1701(2)] appropriate to the particular alleged violation. Assuming that the *Portage* factors were proper for assessing whether the activity in that case violated the MEPA, it does not follow that the *Portage* factors, like the factors used in [*West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979)] are the proper pollution control standard here. A pollution control standard indeed has been articulated by the Legislature, through the [SCESCA], and by the DNR, through the rules promulgated by it pursuant to the [SCESCA.] [Appendix pp 247a-248a.]

The Court of Appeals' additions to *Nemeth* and to § 1701 of MEPA appear within the second set of brackets. In *Nemeth*, this Court had used the phrase "pollution control standard" as shorthand for the statutory "standard for pollution or for an antipollution device or procedure" that occurs in § 1702. 457 Mich at 30. But, within the brackets purporting to paraphrase the meaning of this Court and the terms of the statute, the Court of Appeals substitutes "a standard for pollution control, a standard for a pollution control device, or a standard for a certain procedure." The two prepositional phrases modifying "standard" in the statute become an enumeration that overlooks "antipollution," and the two terms it modifies, "device or procedure," altogether. Under the Court of Appeals' reading, a statute whose text only speaks in various ways of "standards" speaks equally and generally of "procedures" appropriate to the particular alleged violation. The term "antipollution" that modifies both "device" and "procedure," is now gone, so that under the Court of Appeals' reading the relevant standard is no longer a "standard for an antipollution procedure," but any procedure relating to the environment.

The Court of Appeals opinion also demonstrates how dramatically the simple interjection of an indefinite article can change a statute, as this court has observed in *Robinson v Detroit*, 462 Mich 439, 461; 613 NW2d 307 (2000). As if to validate its reading of *Nemeth*, the Court of Appeals also paraphrases the statute itself, saying that MEPA provides for court review "if there is a standard for pollution, or an antipollution device, or a procedure fixed by rule or otherwise."

[emphasis added] (Appendix p 248a). By its paraphrase, the Court of Appeals demonstrates how the simple insertion of the indefinite article can transform a statute that singles out and calls for the special treatment of "a standard for pollution or for an antipollution device or procedure" into a statute that calls for review of multiple and separately denominated standards, devices and procedures. As amended by the Court of Appeals, the statute provides the same treatment that the Legislature specified for "pollution control standards" to all procedures dealing with an environmental subject matter. Finding a relationship to "pollution" or "antipollution" becomes superfluous. According to the Court of Appeals, not only are substantive statutory standards that are arguably in *para materia* with MEPA to be incorporated into MEPA, but also all procedures that are part of a statute that relates to an environmental subject matter become "pollution control standards" that must be considered and reviewed to determine applicability and propriety of the substantive action under MEPA.

Having constructed a bridge that transforms a statutory "procedure" into a MEPA "standard," the Court of Appeals finds the applicable "standard or procedure" in this MEPA case in § 63702, not in § 63709, even though § 63709 specifically adopts Part 17, MEPA. Section 63702, the section that applies "notwithstanding" the application of MEPA, is given the status of a MEPA standard.

Even the analogy between Part 91 and Part 637 by which the Court of Appeals attempted to support its reading of *Nemeth* does not hold up. The Court of Appeals asserts that the decision procedure described in § 63702 is like the procedures of Part 91, the Soil Erosion & Sedimentation Control Act (SESCA), MCL 324.9101 *et seq*, of NREPA, which this Court identified as providing an appropriate MEPA standard in *Nemeth*.

> It is unclear how MCL 324.63702, which expressly provided the procedure for the DEQ to regulate mining specifically in critical dune areas, could be construed as anything but the appropriate "procedure" for allowing mining in critical dune

> areas. In fact, the requirements of MCL 324.63702 are more akin to a "standard or procedure " than the requirements of the SESCA [Soil Erosion and Sedimentation Control Act, Part 91, MCL 324.9101, *et seq.*, of NREPA] that were applied as the "standard" in Nemeth. [Appendix p 248a.]

The fact that SESCA required disclosures and plans apparently led the court to consider SESCA as a "procedure." But, the *Nemeth* Court had not enforced SESCA as a MEPA standard simply because it specified a procedure. Rather, this Court enforced SESCA as a MEPA standard because the Legislature adopted it as a means of protecting water from the most prevalent form of water pollution. *Nemeth*, 457 Mich at 29.

The *Nemeth* Court understood that SESCA fits directly within the language of § 1701(2) of MEPA. 457 Mich at 36. SESCA provided a pollution control standard, approved by the trial court. 457 Mich at 35. This Court approved the lower court's enforcement of SESCA as a MEPA standard because upon a review of the provisions, purposes and policies of SESCA, the Court determined that the trial court had properly determined the appropriate standard by which to evaluate the defendant's conduct, so that a showing of violation established a prima facie case under MEPA. 457 Mich at 29. The SESCA's provisions express the concern for prevention of pollution, as the Court noted, 457 Mich at 27-28:

> Sedimentation and erosion is a well-recognized source of water pollution. In his treatise, Professor Frank P. Gad of the Columbia University School of Law stated:
>
> Sediments carried by erosion represent the greatest volume of wastes entering surface waters . . .
>
> Professor Gad's explanation of the effect of sedimentation and erosion on water supports that contained in the Executive Legislative Analysis. See n 4. Thus, a major purpose of the SESCA is to prevent and control water pollution caused by sedimentation and erosion.

The Executive Legislative Analysis, HB 4709, January 18, 1972, quoted in *Nemeth*, identified sedimentation as the greatest source of water pollution, and said that the SESCA was intended to create uniform rules and guidelines to control soil erosion and sedimentation. 457 Mich at 28 n

4. *Nemeth* adopts the rule that, "where the purpose of the statute used as a pollution control standard is to protect natural resources or to prevent pollution and environmental degradation, a violation of such a statute can establish a prima facie case under MEPA." 457 Mich at 36. There the control measures were a permit system supported by an adequate soil erosion control plan, incorporating soil erosion control measures. *Nemeth*, 457 Mich at 20-22. *Nemeth* applied § 1701(2) of MEPA as written, and took great care to identify a standard relating to pollution.

In the present case, the statute invokes a permit system, which requires a mining plan and environmental impact statement and calls for application of Part 17 to that process. MCL 324.63704; MCL 324.63709. The Court of Appeals found fault only with the identity of the recipient of the permit, not with the application, the mining plan, the environmental impact statement, or the DEQ's decision based upon that statement. However, the express provisions of Part 637, and, in particular, § 63702, do not allow that section to be considered as MEPA standard by its express terms.

Like this Court in *Nemeth*, courts applying § 1701(2) have, until the present case, sought to identify a pollution control standard when applying § 1701(2). *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 487; 608 NW2d 531 (2000); *Her Majesty the Queen v Detroit*, 874 F2d 332, 344 (CA 6, 1989). No other case has directly enforced limitations on administrative process like the identification of proper applicants as MEPA standards, without a showing of some connection with pollution control.[5]

[5] Again, this is not to say that such issues cannot be challenged but that they should be challenged under relevant administrative procedures, not MEPA.

E. **The courts have consistently recognized that standards implemented by agency-administered permit programs are subject to review by different standards, depending upon whether the review must satisfy standards for administrative appeal or MEPA.**

A legal action claiming violation of a statute is not necessarily the same as a legal action claiming violation of MEPA. An agency decision to grant a permit can be challenged by MEPA. *West Michigan Environmental Action Council (WMEAC) v Natural Resources Comm*, 405 Mich 741, 751; 275 NW2d 538 (1979). But, the courts have also repeatedly recognized the distinction between permit review actions and MEPA actions.

WMEAC, 405 Mich at 754, states that under MEPA "the courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary and capricious conduct," as under the Administrative Procedures Act, MCL 24.201 *et seq*. However, they must adjudicate and determine "whether adequate protection from pollution, impairment or destruction has been afforded." 405 Mich at 753.

In *Flanders Industries, Inc v State of Michigan*, 203 Mich App 15, 24-25; 512 NW2d 328 (1993), the court considered the plaintiff's claims under state and federal cost recovery statutes and held that plaintiff's rights were protected. Dismissal of a request for declaratory relief under MEPA was proper, where the plaintiff had not pleaded that the defendant was about to impair or destroy a natural resource. *Id.*, 203 Mich App at 24.

In *Holly Twp v Dep't of Natural Resources*, 189 Mich App 581; 473 NW2d 778 (1991); on reh in part, 194 Mich App 213, 486 NW2d 307 (1992); vacated and motion to reinstate injunction granted, in part, 440 Mich 891; 487 NW2d 753 (1992), the subject land fill permit had issued without proper notice, and Plaintiff challenged it. The act in question differed from

SDMA in that it specifically authorized a court challenge based upon violations of the act, MCL 299.433, so that the court had authority to invalidate the permit on review and to remand to the agency for evaluation of the permit application after proper notice. *Holly Twp*, 189 Mich app at 584. But, Plaintiff had also alleged a MEPA violation, which, the court said on rehearing, required the determination of different issues -- whether a natural resource was involved and whether the effect of the activity on the environment rose to the level of impairment sufficient to justify a court injunction. *Holly Twp*, 194 Mich App at 216. The Court of Appeals determined that injunction was not authorized on the record. The Supreme Court then ruled that the trial court's injunction withstood evaluation for abuse of discretion to the extent that it prevented construction before review of the application by the department. That confirmed the administrative procedure. But, the evidence regarding a MEPA violation was not sufficient to authorize a permanent injunction, so the department could consider a new permit application. *Holly Twp*, 440 Mich at 891.

In *Addison Twp v Department of Natural Resources*, 171 Mich App 122, 126-127; 429 NW2d 612 (1988), rev'd on other grounds, 435 Mich 809; 460 NW2d 215 (1990), the Court of Appeals upheld dismissal of claims based upon violating the exhaustion requirements of the Wetland Protection Act, MCL 281.717, and Inland Lakes and Streams Act, MCL 281.961, but it remanded for the court to proceed to trial on the MEPA claims. The Supreme Court later remanded for consideration of other preemption issues, calling the permits referred to by the Court of Appeals' permits issued for a "limited purpose." 435 Mich at 816.

In *City of Jackson*, 239 Mich App 482; 608 NW2d 531 (2000), a case decided after *Nemeth*, the Court of Appeals reversed the lower court judgment that had applied statutory standards to determine the propriety of a permit when reviewing the administrative decision, but it remanded the case for further findings on the MEPA, nuisance and zoning challenges, noting

that in every MEPA case the court must undertake a factual evaluation using the pollution control standard appropriate to the particular alleged violation, so that the courts can develop the "common law of environmental quality." 239 Mich App at 487-488.

In *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 55; 645 NW2d 391 (2002), the court, following *State Highway Comm v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974), declared that review of other NREPA requirements may be different from, but not supplanted by MEPA. In *Genesco,* Part 201 of NREPA, MCL 324.20101 *et seq*, specifically prevented pre-enforcement judicial review of departmental response activity by MCL 324.20137(4). *Genesco,* 250 Mich App at 53. The Court held that after agency action judicial review is available to determine whether the agency decision is arbitrary and capricious or otherwise not in accordance with law. And, by way of § 1703, MEPA calls for additional specified determinations concerning necessity. 250 Mich App at 55. But, a MEPA action cannot challenge agency pre-enforcement actions where it would interfere with the NREPA procedures established by Part 201.

> As applied, Part 17 supplements, but does not supplant, the denial of subject-matter jurisdiction found in MCL 324.20137(4). The MDEQ must comply with Part 17, but judicial review is delayed until after response activity is completed. Judicial review under MCL 324.20137(5) to determine if the MDEQ's "decision was arbitrary and capricious or otherwise not in accordance with law" would then include the standards of MCL 324. 1703(1) "there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. [*Genesco,* 250 Mich App 55.]

In *Genesco*, the separate NREPA provision controlled what remedy was available under MEPA, in order to assure remediation without judicial delays. Here, the policy of limiting who can apply for permits to mine in critical dune areas also functions independently of the environmental protections of MEPA, relying upon non-environmental criteria.

F. **The Court of Appeals' decision providing for direct application of criteria governing the agency permitting process through MEPA conflicts with the legislative intent expressed when it assigned to the DEQ the application of historical factors limiting mining in critical dune areas.**

The Court of Appeals granted relief under MEPA upon a showing that TechniSand was incorporated in 1991, as though mining according to its mining plan would differently impact the environment if TechniSand had been incorporated earlier. If an activity destroys the environment, it does not matter who does it; if it does not impair or destroy it, the lack of impact does not change because it is done by an older person or a different person. When property is purchased and when a permit is first issued are not factors that change whether an activity will adversely affect the environment. Given policy decisions reflected in the terms of a regulatory statute, such historical facts may affect whether the activity occurs at all. But, this inquiry is unrelated to the impact on the environment.

The Legislature chose to regulate mining in critical dunes within the confines of SDMA, a regulatory statute with very limited, third party review of agency permitting processes. The Legislature might have accomplished its objectives in other ways. It might have specifically authorized a direct appeal to correct administrative errors, as it did in what is now Part 115 of NREPA, reviewed in the *Holly Twp* case. But, it did not. If the DEQ defaults of its duty to the extent that the environment is adversely affected, MEPA provides a remedy. Otherwise, the determinations are left to the Department, subject to any available review as an administrative action. MEPA cannot be rewritten to incorporate into MEPA administrative review functions the Legislature did not provide in the act.

Except for the pollution standards specifically referred to in § 1702, the purpose of MEPA review is not to determine whether the agency followed every required procedure or applied every substantive standard set forth in a regulatory statute. The environment and due

process can be protected without making MEPA a remedy for every agency action. MEPA protects against pollution, impairment, or destruction of natural resources, measured, in an appropriate case, by applicable pollution control standards. But in every case, MEPA requires an allegation and then a determination, based upon a preponderance of the evidence, that the action will result in at least probable pollution, impairment of destruction of the environment. *See*, *Nemeth*, 457 Mich at 35-36; *Flanders*, 203 Mich App at 25. But the Court of Appeals here rebuked Judge Schofield for invoking the MEPA standard where there is a statutory standard that the court calls a "pollution control standard."

> In the present case, rather than addressing, Judge Schofield simply addressed whether TechniSand's proposed mining was likely to "pollute, impair, or destroy" the natural resource in this case--the critical dune area. In essence, Judge Schofield applied MCL 324.63709, the general standard of permitting for mining in any dune area, which mirrors the standard set forth in the MEPA under MCL 324.1703. Judge Schofield's reasoning effectively eliminated MCL 324.63702, which deals specifically with mining in critical dune areas. Judge Schofield erred in disallowing plaintiff to proceed by applying the MEPA to the SDMA and the SDPMA. [Appendix p 249a.]

It is not proper to consider the MEPA standard, according to the Court of Appeals, because who applies for the permit is the standard; actual impairment is irrelevant to the action.

Unless this Court corrects the rule set forth by the Court of Appeals, the public regulated by any sort of environmental law or regulation will be unable to rely upon agency authorization, even when the authorized behavior will have no adverse impact upon the environment, as was shown here after seven days of trial. Permit holders will be forever threatened by the prospect that someone will identify a procedural oversight in the original administrative process that could then be invalidated in a MEPA action. MEPA does not exhibit any intention to repeal existing administrative law or to revise its time limits or extend standing to "any person" with respect to every provision of a statute that has an environmental, "pollution control," objective. By its

terms, MEPA is to supplement other laws, as necessary to protect the environment from pollution, impairment, or destruction. MCL 324.1706. It is not to substitute for other remedies.

Given Plaintiff's failure to identify and use any administrative remedies available under SDMA to correct alleged errors under § 63702, PTD was required to demonstrate substantive environmental harm under MEPA. As the evidence below demonstrated, PTD failed to meet its burden and the Court of Appeals' reversal of the trial court's grant of partial summary disposition to the Defendants on PTD's claim under Part 637 must be reversed.

If the decision of the Court of Appeals stands, MEPA is not a vehicle for development of a common law of environmental protection, but a device for transforming every provision of the NREPA that can be characterized as a "pollution control standard," whether or not concerned with pollution, into a yardstick for measuring per se violations of MEPA. MEPA thus becomes a means for reversing governmental actions by revoking permits at any time after they have been granted, as a matter of law and without regard for lack of environmental consequences, upon showing any a technical violation of any procedural or other standard in a statute, rule or ordinance relating to an environmental subject matter.

II. The Court of Appeals erroneously remanded for entry of an order granting summary disposition upon a purported prima facie showing of MEPA violation, without regard for specifically authorized rebuttal intended to provide for the development of a common law of MEPA, and without regard for evidence supporting the authorized affirmative defense.

A. Standard of Review

Plaintiff requested and the Court of Appeals granted, summary disposition under MCR 2.116(C)(10) for violation of MEPA. Review of a decision on a (C)(10) motion is *de novo*, *Roberts v Mecosta Co. General Hospital*, 466 Mich 57, 62; 642 NW2d 663 (2002); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), and poses the question whether, considering the evidence in a light most favorable to the nonmoving party, there is any genuine issue concerning any material fact, so that the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999); *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. *Maiden v Rozwood,* 461 Mich 109, 119-120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Questions of statutory interpretation are also reviewed *de novo*, beginning with the language of the statute. *In re MCI Telecommunications*, *supra*. Sections 1701 and 1703 of MEPA provide the rule of law in this case.

B. MEPA creates a statutory cause of action that requires resolution of specified factual issues at trial.

MEPA defines the materiality of facts in this action. Section 1701 of MEPA provides for injunctive relief upon a showing of pollution, impairment or destruction of natural resources and

it directs the courts to investigate applicable pollution control standards, the violation of which can make out a prima facie showing of violation. MCL 324.1701; *Nemeth*, 457 Mich at 36. The court is authorized to grant "temporary and permanent equitable relief or to impose conditions on the defendant to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction." MCL 324.1704. But, to fully understand the action, it is necessary also to consider § 1703, which provides:

> When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part. [MCL 324.1703(1).]

The statutory action specifically provides for rebuttal of any prima facie showing of violation and provides for a specific affirmative defense.

MEPA "envisions the judicial development of a common law of environmental quality." *Nemeth*, 457 Mich at 24. Showing the violation of an applicable pollution control standard is not a per se showing of a MEPA violation, but a prima facie showing in an inquiry guided by the rules of evidence that establishes a case "sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor." *Nemeth*, 457 Mich at 25. In *Ray,* 393 Mich at 307, this Court cautioned that development of a common law of environmental quality requires circuit court judges to "set out with specificity the factual findings upon which they base their ultimate conclusions." See, *Nemeth*, 457 Mich at 25. Initially, the plaintiff must show that the conduct of the defendant meets "the low threshold of harm required by MEPA," that the

conduct is likely to pollute, impair or destroy the air, water or other natural resources. *Ray*, 393 Mich at 309. A showing of a violation of an appropriate pollution control standard can make out a prima facie case under MEPA, without further showing of pollution. *Nemeth*, 457 Mich at 36. But, to complete the determination of a violation, the trial court must make "findings of fact, in compliance with MEPA and *Ray*, indicating those facts that led it to conclude that defendants had not successfully rebutted plaintiff's prima facie case." *Nemeth,* 457 Mich at 36-37.

The references in the act to "prima facie case" indicate that the motion to which the showing is pertinent is the motion for directed verdict, which comes at the end of the plaintiff's proofs at trial.

> Importantly, we held in *Ray* that the necessary showing to establish a plaintiff's prima facie case is "not restricted to actual environmental degradation but also encompasses probable damage to the environment as well," I*d.* at 309. General rules of evidence govern this inquiry, and a plaintiff has established a prima facie case when his case is sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor. *Id.* at 309, citing *Gibbons v Farwell*, 63 Mich 344, 348; 29 NW 855 (1886). The basic import of *Ray* has not changed. [N*emeth*, 457 Mich at 25.]

The showing that the defendant's behavior violates an appropriate standard that is of consequence under MEPA is the showing that occurs in the course of trial. This is not surprising, given that even the determination of an "appropriate standard" implies that the court has a record on which to base the determination that the standard is the appropriate pollution control standard.

To drive the point home, the Court elaborated on the effect of making a prima facie showing by way of statutory violation, at note 10:

> We emphasize that this is not the end of the inquiry. The trial court held that plaintiff's showing of defendants' SESCA violations established a prima facie claim under the MEPA. Then, defendants had the opportunity to rebut that prima facie showing either by submitting evidence to the contrary, e.g, that plaintiffs have shown neither pollution, impairment, destruction, nor the likelihood thereof, in spite of proof of the SESCA violation, *or* by showing that there is no feasible

> and prudent alternative to defendant's conduct. Subsection 1703(1). As plaintiffs point out, one could argue that the MEPA is violated any time someone violates the SESCA by putting a shovel in the ground within five hundred feet of a lake or stream. However, the rebuttal and affirmative defense provisions of the MEPA address such frivolous claims. [*Nemeth*, 457 Mich at 37, n 10.]

Evidence of a violation of a MEPA standard does not make out a per se MEPA violation, but a prima facie case, subject to rebuttal at trial concerning whether there is an actual violation. 457 Mich at 36.

Following the lead of *Nemeth*, the Court of Appeals in *City of Jackson v Thompson-McCully Company*, 239 Mich App at 487-488, remanded for development of the required factual determinations:

> A trial court's factual evaluation of a MEPA claim is essential to the development of the "common law of environmental quality." [*Nemeth*, 457 Mich at 24-25, 37.] Each MEPA case must be evaluated on the facts of the particular case, using the pollution control standard appropriate to the particular alleged violation. *Id.* at 35. Whether a plaintiff has established a prima facie case is governed by the general rules of evidence. *Id.* at 25. "[A] plaintiff has established a prima facie case when his case is sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor."

Further, citing *Ray*, 393 Mich 308 and *Nemeth*, 457 Mich 25, the Court of Appeals in *City of Jackson* directed the trial court to look to the statute itself, subsection 1703(1), for guidance with respect to what should be included in the findings of fact. 239 Mich App at 488.

Here the Court of Appeals indicated that Plaintiff had shown a violation of MEPA by showing that TechniSand was not eligible for a permit. To the Court of Appeals, this showing is effectively a per se showing of MEPA violation. The Court of Appeals declined to consider evidence submitted in opposition to PTD's motion that Plaintiff had not shown pollution, impairment, or destruction of natural resources or the likelihood thereof. Rather, it erroneously limited the investigation to the different inquiries of when TechniSand bought the Nadeau site

and when it incorporated, which do not address the statutory question whether the proposed action would pollute, impair, or destroy natural resources.

C. **Even if MEPA does not excuse a plaintiff from responding to a prima facie showing made by motion for summary disposition, it does not absolve the plaintiff from trial by merely setting forth a prima facie case, where there are rebuttal proofs indicating that there will be no environmental harm and that the activity meets the necessity defenses of § 1703.**

Even if MEPA does not require a factual resolution at trial every time a plaintiff makes out a prima facie case that the conduct of the defendant has polluted, impaired, or destroyed or is likely to so affect natural resources by showing a violation of an applicable pollution control standard, the material evidence in the record here prevented summary disposition under ordinary standards governing summary disposition under MCR 2.116(C)(10).

This Court has stated the issues the courts must consider on Motion for Summary Disposition in *Smith v Globe Life Ins. Co.*, 460 Mich 446, 454-455; 597 NW2d 28 (1999):

> This Court in *Quinto v Cross & Peters Co*, 451 Mich. 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
>
> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich. App. 418, 420, 522 N.W.2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich. 109, 115, 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence

> establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

It can be assumed for purposes of this argument that PTD made out the initial showing required to shift the burden to the defendants under *Smith,* 460 Mich at 453. Section 1703 describes the proofs a defendant can submit to avoid judgment: The defendant may rebut the prima facie showing of degradation by "submission of evidence to the contrary," and, by way of affirmative defense, that there is no feasible and prudent alternative, as described in the act. MCL 324.1703(2).

In *WMEAC*, the finding that Plaintiff had established a prima facie case authorized invalidation of the permit. But, the Defendants there had not sought to raise any defenses under what is now 1703(1), either by way of rebuttal or by way of the affirmative defense of necessity. Instead, they "rested their case on a denial that Plaintiffs have made a prima facie showing that the conduct of defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein." *WMEAC*, 405 Mich at 755.

In response to PTD's motion, the Defendants submitted proofs disputing PTD's claims of environmental impairment and supporting the affirmative defense authorized by § 1703(1). Mr. Rodger Whitener's affidavit showed that not all areas designated for control under critical dune provisions possess significant environmental features; (Appendix pp 34a-35a, ¶ 5), and that the Nadeau site does not. (Appendix p 35a, ¶ 6). Human intervention has already degraded the dune formation. (Appendix p 37a, ¶ 17). The mining plan submitted by TechniSand protected identifiable environmental values. (Appendix p 37a, ¶¶ 15, 16). According to the affidavit, dune sand has properties essential to the foundry industry and central to Michigan's automobile industry. (Appendix pp 37a-38a, ¶ 18). In sum, the evidence submitted by Mr. Whitener indicated that there would be no environmental degradation and that any effects should be

considered necessary for, and consistent with, public welfare, in light of the state's paramount concern for the protection of its natural resources from impairment. MCL 324.1703(2).

Even if Plaintiff made out a prima facie case, the evidence submitted by the Defendants showed the existence of material facts concerning whether mining of this portion of a critical dune area would result in pollution, impairment or destruction of a natural resource. But here, the Court of Appeals ordered entry of summary disposition, without even considering the proofs submitted by Defendants in opposition to the motion. However, § 1703 still required the court to consider evidence that the resources on the site were not of significance, even though in a critical dune area and that the resources actually on the site would be sustained and protected, even if sand would be removed.

In *Nemeth*, the identification of a valid, applicable and reasonable pollution control standard did not result per se in a MEPA violation. MEPA itself does not have any specific standards. In *Nemeth*, the violation was made out by findings of fact that the Defendants had not successfully rebutted the prima facie case.

> Here, the trial court made findings of fact, in compliance with MEPA and Ray, indicating those facts that led it to conclude that defendants had not successfully rebutted plaintiff's prima facie case. [457 Mich at 37.]

Defendants here proposed to rebut the claimed impairment and had raised the affirmative defense. They did not rest their case on their denial of Plaintiff's prima facie case. And, they were successful in the rebuttal of that prima facie case trial, so that the trial court did not even reach their affirmative defense. Although the DEQ submitted evidence by affidavit to rebut any showing made by PTD, the Court of Appeals granted Summary Disposition upon a finding of violation of a "pollution control standard," as though it creates a per se violation of MEPA.

The courts ordinarily review an agency action under MCL 600.631 or MCL 24.306. If, on review of the administrative record, a court finds error, it can reverse. MCL 24.306. Or, under MCL 600.631, a court determines "whether such final decisions, findings, rulings or orders are authorized by law . . . ." *13 Southfield Associates v Michigan Dep't of Public Health*, 82 Mich App 678, 686; 267 NW2d 483 (1978). Here, the Court of Appeals did not have jurisdiction under these provisions, which require review within 21 days, MCR 7.104(a), or 60 days, MCL 24.304. It had jurisdiction under MEPA, to determine issues of pollution, impairment, and destruction of natural resources. But, MEPA does not allow simple review for error. It requires findings on a factual record concerning the impairment of the state's resources.

CONCLUSION

Because this is a MEPA action, MEPA and *Nemeth* control this case. MEPA provides environmental protection by allowing declaratory and injunctive relief upon an unrebutted showing of the specified environmental pollution, impairment, or destruction that is not justified by necessity. MEPA provides for specific treatment of statutory or administrative pollution control standards. In this case, the Court of Appeals erroneously determined that provisions governing sand dune mining that are specifically distinguished from Part 17, are additional MEPA procedures constituting pollution control standards. By misreading this Court's decision in *Nemeth*, the Court of Appeals rewrote § 1701 of MEPA to authorize the finding of a MEPA violation due to a procedural error, without even considering whether the activity pollutes, impairs, or destroys the environment in general or the critical dune area in particular.

Even in a case where a party shows a prima facie violation of an applicable and appropriate pollution control standard, that party does not thereby show a per se MEPA violation. Section 1703, which is designed to ensure the development of a common law of environmental protection, authorizes the Defendants to present their proofs at trial. Ordinary rules governing summary disposition prevent summary disposition upon presentation of proofs in rebuttal. Defendants' proofs were ignored. Defendants' proofs in support of the affirmative defense were neglected. Its showing at trial was avoided by holding that the defendants should never have had the opportunity to go to trial.

RELIEF SOUGHT

The Court of Appeals' remand for entry of summary disposition under MEPA must be reversed. The trial court's denial of Plaintiff's motion for summary judgment was in accord with law and the proofs presented to the court, and must be reinstated. The trial court properly granted partial summary disposition to defendants based upon the untimely request for review of the grant of the permit to TechniSand, and that order should be reinstated. Finally, the Court should affirm the trial court's judgment of no cause for action based upon its review of the evidence in furtherance of the development of the common law of environmental quality under MEPA.

Respectfully submitted,

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Date: May 20, 2003
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